Hi-Tech Cable Corporation a Subsidiary of Southwire Company *and* International Brotherhood of Electrical Workers, Local Union No. 1510. Cases 26–CA–15535, 26–CA–15591, 26–CA–15644, and 26–CA–15751

August 10, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

In this case,[1] the Board must decide whether the judge correctly found that the Respondent: committed numerous violations of Section 8(a)(1) of the National Labor Relations Board (the Act); violated Section 8(a)(3) of the Act by failing to employ applicant Jimmy Jones and by discharging employee William Scott because of their union and protected concerted activities; and violated Section 8(a)(5) of the Act by failing to bargain in good faith with the Union about a no-tobacco usage policy, by unilaterally implementing a no-tobacco usage policy, by withdrawing recognition of the Union, by subsequently refusing to process grievances, and by unilaterally granting a wage increase.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions, except as modified below, and to adopt the recommended Order as modified and set forth in full below.

1. The Respondent excepts to three unfair labor practice findings in the judge's decision involving conduct that the amended complaint did not specifically allege to be unlawful. The challenged findings are that: Department Manager Jim French violated Section 8(a)(1) of the Act when he told employee applicant Jimmy Jones that unionized employees at the Respondent's Starkville, Mississippi, facility could get more without a union; French again violated Section 8(a)(1) by telling employee George Hart, during a decertification campaign, about the ''benefits and stuff'' employees would receive if they did not have a union; and Plant Manager Jimmie Blackmon similarly violated Section 8(a)(1) by telling Hart that the Union was keeping employees away from benefits they should be getting. The General Counsel alleged these additional violations in a posthearing brief to the judge.

We find no merit in the Respondent's exceptions to these findings. ''It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.'' *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).[3] Each of the challenged findings meets this two-part test.

With respect to the first part of the test, the complaint specifically alleged, and the judge found, unlawful promises of benefits by another managerial official during the decertification campaign. The complaint also specifically alleged, and the judge found, unlawful interrogation of Jones by French in the same conversation in which he made the statement that employees could get more without a union. We, therefore, find a close connection between the additional violations found and the subject matter of the complaint.

With respect to the second part of the test, the Respondent did not object to the testimony of Jones and Hart about the conduct at issue. It cross-examined these witnesses about this conduct. It presented its own witnesses to testify about this conduct. Finally, it discussed the legality of this conduct in its posthearing brief to the judge. We find that the issues were fully litigated.[4] Based on the foregoing, we affirm the judge's findings of additional 8(a)(1) violations which are closely related to the subject matter of the complaint and were fully litigated.[5]

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[1] On June 27, 1994, Administrative Law Judge Robert C. Batson issued the attached decision. The Respondent filed a motion to vacate the judge's decision, exceptions, and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent's motion to vacate the judge's decision alleges bias and prejudice in the decision and in the judge's conduct of the hearing. We have carefully examined the record and the judge's decision and find no evidence of bias and prejudice against the Respondent. We specifically find that the judge's alleged off-the-record comments about the Respondent's no-tobacco usage policy, although unwarranted if actually made, do not require disqualifying the judge in this proceeding or vacating his decision. We, therefore, deny the motion to vacate.

In sec. III,B,1 of the judge's decision, he incorrectly identified the record exhibit number for the Union's notes of a February 16 bargaining session. Those notes are Jt. Exh. 18.

[3] See also *Williams Pipeline Co*., 315 NLRB 630 (1994).

[4] We find no merit in the Respondent's argument that it was prejudiced by the judge's rejection of a reply brief further addressing these issues.

Member Cohen finds it unnecessary to pass on whether there is a procedural barrier to a finding that such conduct was unlawful. He notes his strong preference for a practice under which the General Counsel would amend the complaint *at trial*, so that the Respondent, at trial, would know the specific conduct that is under attack. In the instant case, however, there are other findings that the Respondent promised employees benefits if they ousted the Union. Thus, a finding of additional violations of the same kind would not add substantively to the remedy.

[5] The Respondent also excepts to the judge's finding that it had not completely rescinded a prior, unlawfully implemented no-tobacco use policy. The judge did not make a separate unfair labor practice

2. The complaint alleged that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to hire Jones because of his sympathy for union representation. The judge found that Department Manager French elicited prounion comments from Jones during the unlawful interrogation noted above. He also found that the Respondent's proffered reasons for failing to hire Jones were pretextual. Finally, he found that the existence of pretextual reasons supported the inference of an unlawful one.

We agree with the judge's findings. We note that he did not, however, conclude his analysis of the motivational issue. Accordingly, based on proof of the Respondent's union animus, its knowledge of Jones' prounion attitude, and the inference of unlawful motivation drawn from the assertion of pretextual reasons, we find that the General Counsel established that Jones' protected conduct was a substantial or motivating factor in the Respondent's decision not to hire him. Furthermore, the finding that all asserted legitimate reasons for failing to hire Jones were pretexts, a fortiori, warrants finding that the Respondent has failed to prove that it would not have hired Jones in the absence of his protected union activity.[6] We, therefore, find that the failure to hire Jones violated Section 8(a)(3) and (1) of the Act.

3. In its exceptions to the judge's finding that it violated Section 8(a)(3) and (1) of the Act by discharging employee William Scott, the Respondent argues, inter alia, that there is no evidence that Scott wore the prounion T-shirt at any time prior to March 30, 1993, the day after he was informed of his termination. We disagree with the Respondent. Although Scott's testimony in this regard is somewhat unclear, we find that it is clear from the surrounding evidence that Scott wore the T-shirt on March 29. In this connection, we rely on Scott's credited testimony that Building Wire Department Manager Gerri Tate asked Scott on March 29 who had worn the prounion T-shirt. When Scott admitted that he had worn the shirt, Tate said that he ''had heard some talk in personnel about it.'' Scott then asked, ''[I]f it was going to be a problem,'' and Tate said, ''[H]e did not know.'' We find, contrary to the Respondent's argument, that this testimony supports the judge's finding that the Respondent's management was aware that Scott had worn the T-shirt before Scott was informed on March 29 of his termination as of March 30. Accordingly, for these reasons, as well as those set forth by the judge, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Scott.

4. In April 1991, the Respondent unilaterally promulgated a no-tobacco usage policy at its Starkville facility. The policy banned all use of tobacco anytime and anywhere on the Respondent's property. The Union filed unfair labor practice charges against the promulgation and enforcement of this policy. On September 30, 1992, the Board found that the Respondent violated Section 8(a)(5) of the Act by unilaterally adopting and enforcing a no-tobacco rule.[7]

On January 7, 1993,[8] the Respondent posted the Board's remedial notice to employees and a companion notice of its own. Both notices pledged rescission of the unilaterally implemented rule and a willingness to bargain with the Union about the subject of tobacco usage by unit employees. These notices remained posted through March 6. Before, during, and after the remedial notice posting period, however, signs remained posted at entrances to separate parking lots for employees and nonemployees that declared the Starkville plant to be a no-tobacco facility. (The Respondent lawfully continued to maintain a total no-tobacco usage rule for nonemployees and unrepresented employees at Starkville and at its 17 other nonunion facilities.)

The Respondent initiated bargaining with the Union about its proposal to reimplement the no-tobacco usage policy for employees in the Starkville bargaining unit. The parties met for negotiations on February 16 and 17, and on March 16. Throughout these negotiations, the Respondent adhered to its proposal for a total ban and rejected the Union's successive counterproposals for designation of some smoking area or areas on the Starkville property. The Respondent also rejected the Union's repeated requests to remove the no-tobacco sign from the employees' entrance to the parking lot. At the end of the March 16 bargaining session, the Respondent's officials stated that the parties were at impasse. On March 29, the Respondent unilaterally reimplemented the no-tobacco usage policy.

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union in good faith about its proposed no-tobacco usage policy. We base this finding on the totality of the circumstances in which the bargaining took place, *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), including the Respondent's behavior at the bargaining table and its conduct away from the table as bearing on its good faith while engaged in bargaining, *Port Plastics*, 279 NLRB 362, 382 (1986). Specifically, we find that the following factors support the judge's finding of bad-faith bargaining by the Respondent.

finding with respect to this conduct. He found, and we agree, that evidence of this conduct was relevant to a consideration of the specific 8(a)(5) allegations in the complaint.

[6] See *Southwest Merchandising Corp. v. NLRB*, 149 LRRM 2257, 2260–2261 (D.C. Cir. 1995); and *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

[7] 309 NLRB 3. The Board also found unfair labor practices for conduct unrelated to the no-tobacco usage policy.

[8] Unless otherwise stated, all subsequent dates are in 1993.

First, the Respondent knowingly refused to remove the sign, posted at the entrance to the employee parking lot, declaring without exception that the plant was a no-smoking facility. This sign expressly contradicted assurances in the posted remedial notices that the Respondent had rescinded the no-tobacco usage ban for unit employees. The absence of any evidence of continued enforcement of the unlawful ban does not preclude our finding that unit employees would reasonably regard the sign as a threat that the ban could still be invoked against them. Furthermore, maintenance of the sign forced the Union to bargain unsuccessfully for a complete, unequivocal restoration of the status quo. Compliance with a Board remedy is not a mandatory subject for bargaining. The Union had a right to insist on the sign's removal.

Second, although the Respondent's insistence on a proposed reimplementation of a total ban of the use of tobacco products at the plant was not per se unreasonable, its repeated reference to companywide policy as a justification for its bargaining position casts doubt on its willingness to engage in meaningful negotiations.[9] In effect, the Respondent told the Union that it would not give employees at its one unionized facility something (i.e., designated smoking areas) that it did not give nonunion employees at its other facilities.[10] Such statements indicated the futility of union representation, in derogation of assurances given by the Respondent to employees in a Board notice posted only a few months earlier in settlement of other unfair labor practices charges.[11]

Third, in marked contrast to the foregoing, Department Manager French unlawfully suggested to employee applicant Jimmy Jones on January 26 that the unionized employees at Starkville could get more without a union. In the 2 months following the termination of negotiations, other officials of the Respondent made similar unlawful remarks to employees during a decertification campaign. Collectively, this conduct away from the bargaining table reinforced the impression made by references to company policy during bargaining. The Respondent's officials demonstrated a general unwillingness to concede anything in bargaining with the Union and sought to portray continued representation by the Union as an impediment to the receipt of better benefits.[12]

We conclude from the totality of the circumstances described above that the Respondent did not intend to engage in meaningful negotiations about a tobacco use policy with the aim of reaching an agreement with the Union. Instead, it had predetermined to reimplement the prior unlawfully implemented policy as soon as possible and to undermine further the Union's status as an exclusive bargaining representative. Accordingly, we find that the Respondent violated Section 8(a)(5) of the Act by failing to bargain in good faith with the Union.

5. On June 1, the Respondent withdrew recognition from the Union based on individual cards signed by 117 of 203 unit employees stating that they no longer desired to be represented by the Union. The judge found that the Respondent violated Section 8(a)(5) by withdrawing recognition of the Union because the cards had been signed in the context of prior unremedied unfair labor practices by the Respondent. We agree with the judge that the decertification cards on which the Respondent relied were tainted. The basis for our agreement, however, requires further explication of the effects of the Respondent's unlawful conduct.

As previously indicated, the Respondent posted a Board notice on January 7, as part of the remedy for its prior unfair labor practices, which included an unlawful refusal to bargain with the Union about the no-tobacco use policy. The notice remained posted for 60

[9] Contrary to argument in the Respondent's exceptions, the judge's finding that the Respondent's negotiators repeatedly relied on company policy can be based entirely on the parties' bargaining notes, which are part of the record. We note in particular the following exchanges between the Union's negotiator, Joe Davis (JD), and the Respondent's negotiator, Walter Lambeth (WL):

From the Respondent's notes of the February 17, 1993 bargaining session (Jt. Exh. 31):

JD: You said Rudy was referring to company policy.

WL: No tobacco usage is a corporate policy that is in effect at all Southwire facilities except Starkville.

JD: We represent Starkville, we don't care about corporate policy.

WL: We understand we have to bargain about the policy here. What we're telling you is if we make an exception here we will hear from every other plant and they will expect us to make an exception for them.

From the Respondent's notes of the March 16, 1993 bargaining session (Jt. Exh. 31):

JD: Rudy said that corporate policy is no tobacco usage, no designated smoking areas. Do you have the authority to negotiate here? Can you change corporate policy.

WL: We can change policy at Starkville, we certainly have the authority to do that. What Rudy is telling you is that if we agree to an exception here who is to say they will not ask for designated smoking areas or let them smoke in the parking lot at other Southwire plants. It's not fair to make an exception to the smoking policy here and not elsewhere. We got to think about the effect on other plants. Whatever is done here will have effect on all other plants. We have to factor that into our thinking.

[10] We agree with the Respondent that its negotiators also asserted health, cost, and production-related justifications in support of their bargaining position, but these additional reasons do not diminish the significance of the company policy justification.

[11] Pursuant to a settlement agreement in Case 26–CA–15098, the Respondent posted a notice from September 16 through November 16, 1992. The notice stated, in relevant part:

WE WILL NOT inform you that it is futile for you to retain the Union as your bargaining representative because we will not make changes.

[12] As noted, supra, Member Cohen finds a possible procedural barrier to a conclusion that this conduct violated Sec. 8(a)(1). He finds, however, no such barrier to a consideration of the evidence as bearing on the bona fides of bargaining.

days. During that time, not only did the Respondent fail and expressly refuse to remove a sign which conflicted with the language of the notice, it again violated Section 8(a)(5) by failing to fulfill its obligation to bargain in good faith with the Union. In addition, the Respondent violated Section 8(a)(3) by refusing to hire Jimmy Jones, and it violated Section 8(a)(1) by unlawful interrogations and by stating that employees could get more without a union.

The judge incorrectly stated that the signing of decertification cards began a day after the end of the remedial notice posting period. In fact, of the 117 cards submitted, 42 bore dates from February 11 to March 7. The Board has held that expressions of support for decertification that have been solicited during a remedial notice posting period for an 8(a)(5) violation are not a reliable indicator of employee sentiment.[13] ''[T]he 60-day posting requirement is not to be taken lightly or whittled down as the purpose of the notice is to provide sufficient time to dispel the harmful effects'' of a respondent's unfair labor practices.[14] We find such precedent controlling here, particularly in light of conduct inconsistent with the notice and the commission of additional unfair labor practices. Accordingly, none of the cards signed prior to the end of the posting period are a reliable indicator of employee sentiment.

Less than a majority of unit employees signed decertification cards after the end of the posting period. Even assuming, arguendo, that they were not tainted by the Respondent's prior unremedied unfair labor practices, they would not, standing alone, provide a sufficient objective basis for a reasonable doubt of the Union's continuing majority status. Moreover, we find that the Respondent's repeated refusal to bargain in good faith with the Union about the no-tobacco usage policy—an unfair labor practice affecting the entire unit—coupled with the several 8(a)(1) violations and the two 8(a)(3) violations committed during or shortly prior to the decertification effort, would likely have such a serious collective impact on unit employees as to encourage their disaffection with the Union. Indeed, although the Respondent's motivation is not dispositive here, several of the unfair labor practices described above and in the judge's decision clearly were meant to undermine the Union. Furthermore, the promises of benefits and solicitation to support a decertification effort directly conflicted with disavowals of such unlawful conduct made in the remedial notice to employees that the Respondent posted in late 1992 pursuant to the settlement agreement in Case 26–CA–15098.

Based on the foregoing, we find that the Respondent's unremedied unfair labor practices removed all of the decertification cards as a lawful basis for the Respondent's withdrawal of recognition.[15] We, therefore, affirm the judge's finding that the Respondent violated Section 8(a)(5) of the Act by withdrawing recognition of the Union as the exclusive collective bargaining representative.[16]

[13] *Robertshaw Controls Co*., 263 NLRB 958, 959–960 (1982); *Chet Monez Ford*, 241 NLRB 349, 351 (1979).

[14] *Chet Monez Ford*, supra at 351.

AMENDED CONCLUSIONS OF LAW[17]

Insert the following as paragraphs 5(e) and (f).

''(e) Promising its employees unspecified benefits to support the decertification effort.

''(f) Promising its employees that they would have better benefits if they did not have a union and telling them that the Union was keeping them away from benefits.''

ORDER

The National Labor Relations Board orders that the Respondent, Hi-Tech Corporation, a Subsidiary of Southwire Company, Starkville, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees and applicants for employment concerning their union activities and sympathies.

(b) Soliciting employees not to wear prounion insignia.

(c) Soliciting employees to support an effort to decertify the Union.

(d) Promising employees unspecified benefits to support the decertification effort.

(e) Promising employees unspecified benefits to stop wearing a union button.

(f) Promising employees that they would have better benefits if they did not have a union and telling them that the Union was keeping them away from benefits.

(g) Discharging or refusing to hire employees because they engage in protected union and other concerted activities.

(h) Refusing to recognize and bargain collectively with the International Brotherhood of Electrical Workers, Local Union No. 1510 as the exclusive representative of an appropriate unit of employees, with respect to rates of pay, hours of employment, and other terms and conditions of employment.

[15] Member Cohen notes the absence of any objective evidence that conduct other than the unfair labor practices could have resulted in the decertification effort.

[16] In affirming the judge's conclusion that the Respondent subsequently violated Sec. 8(a)(5) by refusing to process employee grievances, we rely solely on our finding that the Respondent's withdrawal of recognition was unlawful, so that it had a continuing bargaining duty to process grievances.

[17] The judge failed to refer to certain unfair labor practice findings in his conclusions of law and recommended Order and notice. We shall make the appropriate additional express conclusion and remedial modifications.

(i) Refusing to process grievances filed by or on behalf of employees in the bargaining unit represented by the Union.

(j) Unilaterally granting its employees wage increases without negotiating with the Union on request.

(k) Unilaterally implementing a no-tobacco usage policy at its Starkville, Mississippi facility.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union as the exclusive collective-bargaining representative for all employees in the appropriate unit described below, and, on request, bargain in good faith with the Union about their wages, hours, and terms and conditions of employment, including the usage of tobacco by unit employees, and embody any understanding reached in a signed agreement. The appropriate unit is:

> All hourly rated production and maintenance employees at Hi-Tech Cable Corporation's cable and wire plant in Starkville, Mississppi, excluding office and clerical employees, technical employees, professional employees, management, supervisory employees, and guards as defined in the Act.

(b) On request by the Union, rescind the no-tobacco usage policy for unit employees that the Respondent implemented on March 29, 1993.

(c) Resume the processing of the grievances of bargaining unit employees represented by the Union and, on request, process those grievances that the Respondent unlawfully refused to process since June 4, 1993.

(d) Offer William Scott immediate and full reinstatement to his former job, and offer Jimmy Jones the job for which he applied or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(e) Remove from its files any reference to the unlawful discharge of Scott and the refusal to hire Jones and notify these employees in writing that this has been done and that these unlawful discriminatory actions will not be used against them in any way.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its plant in Starkville, Mississippi, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees or applicants for employment concerning their union activities and sympathies.

WE WILL NOT solicit our employees not to wear prounion insignia.

WE WILL NOT solicit our employees to support an effort to decertify the Union.

WE WILL NOT promise our employees unspecified benefits to support the decertification effort.

WE WILL NOT promise our employees unspecified benefits to stop wearing a union button.

WE WILL NOT promise our employees that they would have better benefits if they did not have a union or tell them that the Union was keeping them away from benefits.

WE WILL NOT discharge or refuse to hire or otherwise discriminate against any employees for engaging

in protected concerted activities for your mutual aid and protection or for supporting the International Brotherhood of Electrical Workers, Local No. 1510 or any other Union.

WE WILL NOT refuse to recognize and bargain collectively with the International Brotherhood of Electrical Workers, Local No. 1510 as the exclusive representative of an appropriate unit of our employees, with respect to their wages, hours of employment, and other terms and conditions of employment.

WE WILL NOT refuse to process grievances filed by or on behalf of employees in the bargaining unit represented by the Union.

WE WILL NOT unilaterally grant our employees wage increases without negotiating with the Union on request.

WE WILL NOT unilaterally implement a no-tobacco usage policy at our Starkville, Mississippi facility.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize the Union as the exclusive collective-bargaining representative for all employees in the appropriate unit described below, and, on request, WE WILL bargain in good faith with the Union about their wages, hours, and terms and conditions of employment, including the usage of tobacco by unit employees, on our property, and embody any understanding reached in a signed agreement. The appropriate unit is:

> All hourly rated production and maintenance employees at Hi-Tech Cable Corporation's cable and wire plant in Starkville, Mississippi, excluding office and clerical employees, technical employees, professional employees, management, supervisory employees, and guards as defined in the Act.

WE WILL, on request by the Union, rescind the no-tobacco usage policy for unit employees that we implemented on March 29, 1993.

WE WILL resume the processing of the grievances of bargaining unit employees represented by the Union and, on request, WE WILL process those grievances that we have unlawfully refused to process since June 4, 1993.

WE WILL offer William Scott immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify William Scott that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL offer Jimmy Jones immediate and full employment to the job for which he applied or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from our refusal to hire him, less any net interim earnings, plus interest.

WE WILL notify Jimmy Jones that we have removed from our files any reference to our refusal to hire him and that this refusal will not be used against him in any way.

HI-TECH CABLE CORPORATION A SUBSIDIARY OF SOUTHWIRE COMPANY

Jack Berger, Esq., for the General Counsel.
Walter O. Lambeth, Jr. and *Douglas H. Duerr, Esqs. (Elarbee, Thompson & Trapnell)*, for the Respondent.
Joe Davis, International Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT C. BATSON, Administrative Law Judge. This case was tried before me at Starkville, Mississippi, on October 12, 13, and 14, 1993,[1] based on a second order consolidating cases, amended consolidated complaint and notice of hearing, the operative complaint here was issued by the Regional Director for Region 26 (Memphis, Tennessee), of the National Labor Relations Board (the Board) pursuant to the National Labor Relations Act (the Act), alleging that Hi-Tech Cable Corporation a Subsidiary of Southwire Company (Respondent or Company), had violated Section 8(a)(1), (3), and (5) of the Act in various particulars. All charges here were filed by the International Brotherhood of Electrical Workers, Local Union No. 1510 (the Union). The charge in Case 26–CA–15535 was filed on March 19, Case 26–CA–15591 on April 29, Case 26–CA–15644 on June 7, and Case 26–CA–15751 on September 21. All charges were timely served on Respondent.

The operative complaint alleges that Respondent by its various supervisors and agents interrogated its employees and applicants for employment regarding their sympathies and sentiments toward the Union; solicited its employees not to wear union insignia or buttons and to support the decertification effort; promised its employees unspecified benefits if they stopped wearing union buttons in violation of Section 8(a)(1) of the Act. It further alleges that Respondent refused to hire an applicant for employment and discharged one employee in violation of Section 8(a)(1) and (3) of the Act. Alleged also is that Respondent bargained in bad faith with the Union regarding its ''no-tobacco usage policy'' and unilaterally implemented that policy at its Starkville, Mississippi facility. Further, it is alleged that Respondent failed and refused to process employee grievances; increased its employees' wages, and on June 2, withdrew recognition of the

[1] All dates are in 1993 unless otherwise indicated.

Union as the exclusive collective-bargaining representative of employees in the appropriate unit, all in violation of Section 8(a)(1) and (5) of the Act. In its duly filed answer to the complaint Respondent denies that it has violated the Act in any respect, but admits that it implemented a ''no-tobacco usage policy''; granted its employees a wage increase, and withdrew recognition of the Union as the exclusive collective-bargaining representative of an appropriate unit of employees.

All parties have been afforded full opportunity to appear, introduce evidence, to call witnesses,[2] examine and cross-examine witnesses, to introduce all relevant documentary evidence,[3] and to file posttrial briefs.[4] Based on the entire record, including my observation of the demeanor of the witnesses testifying under oath, and due considering of the posttrial briefs,[5] I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the Respondent admits, and I find that at all times material, Respondent was a corporation with an office and place of business located at Starkville, Mississippi, where it is engaged in the manufacture and sale of wire and cable products. During the 12-month period preceding the issuance of the complaint, in the conduct of its business sold and shipped goods valued in excess of $50,000 to points located directly outside the State of Mississippi. During the same period of time it also purchased and received goods and products valued in excess of $50,000 from points located directly outside the State of Mississippi. Accordingly, Respondent at all times material here has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction and Background*

The Union was certified as the exclusive collective-bargaining representative of all employees in an appropriate unit in 1983 at a time when Respondent was owned by Phelps Dodge. The unit is:

> *Included*: All hourly rated production and maintenance employees at Respondent's cable and wire plant in Starkville, Mississippi.
>
> *Excluded*: Office and clerical employees, technical and engineering employees, professional employees, management and supervisory employees and guards as defined in the Act.

At some point after 1983, the facility was acquired by Hi-Tech Cable Corporation which apparently voluntarily recognized the Union. The record does not disclose whether Hi-Tech negotiated a new contract. In the fall of 1989, the Company was acquired by the Southwire Corporation which voluntarily recognized the Union as the exclusive collective-bargaining representative of the employees in the unit described above. The parties commenced bargaining for a collective-bargaining agreement, about March 22, 1990. On July 11, 1990, after about 22 bargaining sessions, Respondent declared that the parties were at impasse and implemented its final offer. There was no contention that Respondent had bargained in bad faith or that the parties were not, in fact, at impasse.

In December 1990, the Union won a decertification election in Case 26–RD–833 by a vote of 128 in favor of and 86 opposed to the Union. Accordingly, the Union was again certified to be the exclusive representative of the employees in the appropriate unit.

On June 17, 1991, the Union filed an unfair labor practice charge against Respondent in Case 26–CA–14536. On July 22, 1991, a complaint issued alleging that Respondent had, inter alia, violated Section 8(a)(1), (3), and (5) of the Act, by unilaterally adopting and enforcing a no-tobacco usage rule; refusing to furnish the Union with necessary information, for collective bargaining; and discharging an employee for engaging in protected concerted activities. *Hi-Tech Cable Corp*., 309 NLRB 3 (1992).

In that case the administrative law judge found that Respondent had violated Section 8(a)(1) and (3) of the Act by discharging an employee for engaging in protected concerted activities. He also found Respondent had failed to bargain in

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[2] The Respondent indicated that it would call all of about 117 employees who had signed cards stating they no longer desired to be represented by IBEW Local 1510 to elicit testimony relating to their subjective state of mind at the time of signing as to whether Respondent's conduct past or present had any impact on their decision to sign. As discussed more fully infra, I did not permit this but did allow Respondent to call approximately 25 such signers.

[3] Exhibits offered by counsel for the General Counsel and received into evidence are cited as G.C. Exh., by Respondent as R. Exh., and Joint Exhibits as Jt. Exh.

[4] Briefs were filed by counsel for the General Counsel and the Respondent. On February 8, 1994, Respondent filed with me a response to brief on behalf of the General Counsel. On February 14, 1994, the counsel for the General Counsel filed a motion to strike response to brief on behalf of the General Counsel. On February 22, 1994, Respondent filed an opposition to the General Counsel's motion to strike. § 102.42 of the Board's Rules and Regulations make no provision for response or reply briefs to the administrative law judge. While there are cases where, on proper request, a judge may permit such reply briefs and even in legally complex cases where the judge may request them, this is not such a case. Moreover, the Respondent's response to the General Counsel's brief merely elaborates on, and argues, interpretation of testimony which is the province of the judge and does not, as contented, reply to the General Counsel's customary motion made in brief to conform the pleadings to the proof which does not add any allegations not litigated. Accordingly, the motion to strike the Respondent's response to brief on behalf of the General Counsel is granted.

[5] The facts found here are based on the record as a whole and my observation of the witnesses. The credibility resolutions, here, have been derived from a review of the entire testimonial record and exhibits with due regard for the logic of probability. The demeanor of the witnesses and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962). As to those witnesses testifying in a contradiction to the findings here, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredulous and unworthy of belief. All testimony has been reviewed and weighed in light of the entire record. No testimony has been pretermitted.

good faith with the Union by refusing to give either the employee or the Union a copy of any written warning given an employee necessary to the processing of grievances. The judge found, however, that Respondent did not violate Section 8(a)(5) and (1) by the implementation and enforcement of its no-tobacco usage rule in view of the management-rights clause to which the Union had tentatively agreed. the pertinent clauses are:

> Section 1. Make, change, and enforce reasonable rules for efficiency, cleanliness, safety, attendance, conduct and working conditions . . . .
>
> . . . .
>
> Section 3. The Company reserves the right, in its sole discretion, to make reasonable rules and regulations for the purpose of efficiency, safe operation, and maintaining order and discipline among the work force.

Article III, *Union Rights and Obligations*, provides:

> The Union understands the Company has the right to make and enforce reasonable rules and regulations and agrees to uphold such rules and regulations in regard to . . . the employees' conduct on the job, and all other reasonable rules and regulations established by the company which are not in conflict with this Agreement.

Similarly, in article XII, *Discharge, Discipline, and Company Rules*, the contract states:

> The Company alone has the right to make such reasonable rules and regulations, subject to the Union's right to grieve the reasonableness, as it may from time to time deem best for the purposes of maintaining order, effecting safe operation of the plant, and promoting efficiency. The Company will give the Union a copy of any new or changed rule prior to putting said rule into effect. The Union agrees to uphold such rules and regulations established by the Company.

On review the Board found that the recourse left the Union to the grievance procedure concerning the reasonableness of the unilaterally implemented rule did not afford full bargaining rights assured by Section 8(a)(5) of the Act. Citing *Johnson-Bateman Co.*, 295 NLRB 180 (1989). The Board found the no-tobacco usage rule to be a mandatory subject of bargaining and in the absence of a ''clear, unequivocal, and unmistakable waiver'' by the Union the general language of the management-rights clause did not allow the Union to perform its 8(a)(5) statutory obligation. Thus, Respondent violated Section 8(a)(5) and (1) by their conduct. This Decision and Order issued September 30, 1992.

The Respondent indicated that it would seek court review in the United States Court of Appeals for the Fifth Circuit of the Board's Order and refused to comply therewith. On May 18, 1993, the Regional Director for Region 26 advised Respondent that the Region had decided to recommend enforcement of the Board's Order in this case and had so recommended. (G.C. Exh. 1, attachment 1.)

In the meanwhile, the Union filed charges in Case 26–CA–15098 alleging various violations of Section 8(a)(1), (3), and (5) of the Act. On September 10, 1992, the parties entered into a settlement agreement of these charges which required the posting of a notice to employees which was posted in four different locations throughout the plant from September 16 through November 16, 1992, the settlement agreement contained a nonadmissions clause. The notice posted pursuant to the settlement agreement is as follows:

> WE WILL NOT enforce our No-Solicitation/No-Distribution of Literature rule selectively and disparately by prohibiting union solicitations and distributions while permitting non-union solicitations and distributions.
>
> WE WILL NOT promise you improved benefits if you reject the Union as your collective bargaining representative.
>
> WE WILL NOT inform you that it is futile for you to retain the Union as your bargaining representative because WE WILL NOT make changes.
>
> WE WILL NOT solicit you to sign or support a decertification petition.
>
> WE WILL NOT solicit you to act as our agent in a decertification effort.
>
> WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.
>
> HI-TECH CORPORATION, A SUBSIDIARY OF SOUTHWIRE COMPANY
>
> DATED: 9/16/92 BY: /S/KATHRINE M. BROWN[,] Mgr., Personnel

On January 7, 1993, the Respondent advised Region 26 of the Board that it had withdrawn its petition for review by the United States Court of Appeals for the Fifth Circuit, and would comply with the Board's Order. Accordingly on that date it posted the following notice in four places in the plant, drawing/stranding bulletin board, building wire/scale bulletin board, maintenance/power cable bulletin board, and the bulletin board in the main employee entrance. The notice was signed by Personnel Manager Katherine M. Brown.

> WE WILL NOT unilaterally and without consultation with the International Brotherhood of Electrical Workers, Local Union No. 1510 institute a rule prohibiting employees from using tobacco on company property.
>
> WE WILL NOT enforce the no-tobacco usage rule by issuing written warnings to employees who violated the rule.
>
> WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities for your mutual aid or protection or for supporting the International Brotherhood of Electrical Workers, Local Union No. 1510 or any other union.
>
> WE WILL NOT refuse to bargain with the International Brotherhood of Electrical Workers, Local Union No. 1510 by refusing to give either the Union or the employee to whom a written warning is given a copy of that written warning before a grievance is filed, or by refusing to furnish the Union with other information it requests which is necessary to the processing of grievances and to the fulfillment of its responsibilities as the exclusive representative of the employees in the appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw, and rescind the no-tobacco usage program we unlawfully put into effect, and WE WILL bargain collectively, on request, with the Union concerning the no-tobacco usage rule as the exclusive representative of employees in the following appropriate unit:

WE WILL remove from employee Lannie Biddle's files the written warning resulting from the enforcement of the no-tobacco usage rule, and WE WILL notify him in writing that we have done so.

WE WILL offer Mickle Smith immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Mickle Smith that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL give either the Union or the employee to whom a written warning is given a copy of that written warning before a grievance if filed, and WE WILL furnish the Union information it requests which is necessary to the processing of grievances and the fulfillment of its responsibilities as the exclusive representative of the employees in the appropriate unit.

HI-TECH CORPORATION, A SUBSIDIARY OF SOUTHWIRE COMPANY

DATED: 9/16/92

Simultaneously, with the posting of the Board's official notice to employees, the Respondent elected to post alongside it its own notice reading:

Southwire has decided to withdraw its appeal of the ruling of the National Labor Relations Board concerning the no-tobacco usage rule. With business conditions as they are, the company cannot afford to continue the expensive litigation in this matter. Although we feel we would have won the case in the courts, we must put the matter behind us and end the expense of fighting this dispute in court. *We are therefore rescinding the no-tobacco usage rule that went into effect April 1, 1991*. Effective immediately, the rule concerning usage of tobacco is the same as that in effect prior to April 1, 1991. If you have any questions about the smoking rules, please see your supervisor.

Some of you may have seen that the United States Environmental Protection Agency has now published a report indicating secondary tobacco smoke can be highly dangerous to non-smokers. We hope that any Southwire employees who are still smokers will be considerate enough of your co-workers to refrain from smoking in the plant.

Because we feel very strongly about this smoking issue, we will propose to the union that Southwire again become a no-tobacco usage facility and we will be meeting to discuss that issue with them.

Date: Jan. 7, 1993 By: /s/ Jimmie Blackmon
Jimmie Blackmon
Plant Manager

Jt. Exh. 2.

From September 16 until November 17, 1992, and from January 7 through March 8, 1993, notices to employees were posted in the plant pursuant to the settlement agreement and to the Board's Order.[6]

Notwithstanding Respondent's posting of the notice and asserted compliance with the Board's Order, in its brief, it stated that the lawfulness of the Board's Order is again pending before the United States Court of Appeals for the Fifth Circuit. (Tr. 6.) *NLRB v. Hi-Tech Cable Corp., a Subsidiary of Southwire Co*., enfd. mem. 25 F.3d 1044 (5th Cir. 1994). The foregoing background is necessary to evaluate and assess the evidence presented in this case relating to the specific unfair labor practices alleged there.

B. *Negotiations of the No-Tobacco Usage Policy*

Paragraph 16 of the operative complaint alleges that since on or about February 16, 1993, Respondent has bargained in bad faith with the Union regarding its no-tobacco usage policy at its Starkville facility. An analysis of the evidence pertaining to Respondent's negotiations with the Union must be considered in light of the fact that from September 16 to November 17 the notice posted pursuant to the settlement agreement stated, inter alia:

WE WILL NOT promise you improved benefits if you reject the Union as your collective bargaining representative.

WE WILL NOT inform you that it is futile for you to retain the Union as your bargaining representative because WE WILL NOT make changes.

WE WILL NOT solicit you to sign or support a decertification petition.

WE WILL NOT solicit you to act as our agent in a decertification effort.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

In addition the notice posted from January 7 to March 8, pursuant to the Board's Order and the impact that these notices had on the employees.

On January 8, a day after the Respondent posted the Board's notice to employees along side its own notice to employees Respondent's director of industrial relations, Rudy J. Pilney, sent a letter to Herman E. Holley, international representative of IBEW stating:

[6] The full text of the notice, posted pursuant to the settlement agreement; the Board's Order, and the Employer's notice, posted alongside the Board's notice, are reproduced here in order to better assess the full impact they may have had on the bargaining unit employees.

> Dear Mr. Holley:
>
> Pursuant to a ruling by the National Labor Relations Board, of which you are aware, the Company has rescinded its no-tobacco usage rule at the Starkville facility. The Company desires to implement the rule as set forth in the attached notice. Accordingly will you please contact me at your earliest convenience to arrange for a negotiating meeting to discuss the rule. The Company is also open to discussion, at this meeting, or on any other appropriate subject.

Joint Exhibit 5. Attached to this letter was the purposed rule by the Respondent which was essentially the same as that which it had previously unlawfully implemented.

Also on January 8, International Vice President Gurly wrote Pilney stating in substance that he was assigning International Representative Joe Davis of his staff to contact IBEW Local 1510 to arrange a mutually agreeable date for a meeting to discuss the matter and that Davis would be contacting the Union soon. (Jt. Exh. 5.)

On January 12, Pilney wrote Davis advising him that Gurly had informed him that Davis would be handling the negotiations for the Union and stating: ''The Company desires to implement the rule essentially set forth in the attached notice.'' He asked that Davis contact him immediately to arrange a negotiating date. (Jt. Exh. 6.) The purposed no-tobacco usage rule was the same as Respondent had previously imposed.

Also on January 12, Walter Lambeth, attorney, sent a letter to Joe Davis, stating in effect that he, Lambeth, was available on any Thursday or Friday during the month of January along with other dates. (Jt. Exh. 7.)

On January 15, Lambeth again wrote Davis stating:

> Since our conversation earlier this week, I have not heard from you even though I contacted your home today and left a message with your wife. It was my understanding that you were going to call either Rudy Pilney or me to set up a date for a negotiating meeting in Starkville.'' [Jt. Exh. 8.]

The paragraph confirming a telephone conversation Lambeth had with Davis earlier that day, he wrote on January 18, another letter stating, inter alia:

> Frankly your refusal to discuss tentative dates for a meeting makes it appear that the Union is attempting to interpose delay in this matter. I am asking that you reconsider your position and call either Rudy Pilney or me to set up a tentative meeting date.

Lambeth also suggested that they correspond by fax other than mail. (Jt. Exh. 9.)

On January 20, Davis wrote Pilney requesting certain information:

> (1) Copies of all Company policies regarding tobacco use.
>
> (2) A statement of all Company policies regarding tobacco use.
>
> (3) A list of employees who use tobacco and a list of non-users and in addition thereto, copies of all chemical compounds used at the plant and other material related to safety and emergency responses. [Jt. Exh. 10.]

By fax Lambeth wrote Davis on January 22, stating he was forwarding the information he had requested and asking Plant Manager Blackmon to forward under separate cover copies of data relating to safety and chemicals in the plant. (Jt. Exh. 11.) On January 26, 1993, again by fax Lambeth wrote Davis confirming a telephone conversation earlier that date in which he had stated he had been informed that the Union had received the material requested and had agreed to a negotiating meeting on Tuesday, February 16, and a half-day Wednesday, February 17. He further suggested that they meet at the Starkville Holiday Inn and stated that he would arrange for facilities there. (Jt. Exh. 13.)

By Fax letter dated February 1, Lambeth again wrote Davis suggesting that they communicate by facsimile transmission with a hard copy by U.S. mail in order to expedite their communications. And again confirming February 16 and 17, as dates for a meeting. (Jt. Exh. 15.)

1. The February 16 meeting

The first meeting convened on February 16 at approximately 10 a.m. Representing the Respondent was Rudy Pilney, Walter Lambeth, Personnel Director Kathy Brown, and Janet Tomlinson, note taker. For the Union there were Joe Davis, Joe Shumaker, and Demsey Blanton. Both parties made notes of the meeting. The Respondent's notes are much more extensive than those taken by the Union, however, there is little, if any, material conflict in the notes. The Respondent's notes of this negotiating session is Joint Exhibit 16, the Union notes is General Counsel's Exhibit 3. Pilney began the negotiations by stating:

> Basically we wanted this meeting for the purpose of negotiating with you about implementing the no-tobacco usage rule at the Starkville facility. The Company is willing to listen, talk, consider and discuss anything you want to concerning re-implementing the no-tobacco usage rule.

The Union in essence wanted the Company to maintain the tobacco usage policy that had been in effect prior to its implementation of the no-tobacco usage rule. During the course of this meeting the Respondent gave to the Union numerous articles and graphs, about 800 sheets, concerning the adverse health effects of smoking. Representative of these are items from EPA; newspaper articles; infertility; heart disease; periodontal disease; HRM articles; which were articles written by the Heart Association and numerous others which are Joint Exhibits 20 through 29 and others.

Among other reasons given by the Respondent for declining to permit any tobacco usage on its property was that it was corporate policy. The Respondent stated that it wanted to discourage its employees from tobacco use and the Union's position would encourage it. The Respondent also alluded to the cost as represented by health associations to employers caused by the use of tobacco. This meeting convened at 10 a.m. and lasted approximately 1 hour at which time it adjourned.

The meeting reconvened at 1 p.m. During the afternoon session the parties discussed, inter alia, the areas in which, prior to the implementation of its no-tobacco usage policy in April 1991, employees could smoke. At both the morning and the afternoon session the Union pointed out that Respondent had not removed the large signs proclaiming

Southwire to be a no-smoking or no-tobacco usage facility located at the entrances to the plant, which had been posted almost 2 years earlier when Respondent implemented the unlawful rule and requested that they be removed. Respondent did not comply with this request.

The Union, at this meeting, also requested and was granted permission to tour the Respondent's premises, i.e., the plant area so it would have a better idea where to propose smoking and nonsmoking areas. This meeting adjourned about 2:30 p.m., after less than a total of 2 hours bargaining. Union representatives were then allowed to tour Respondent's plant. No progress was made. At trial, Blackmon testified that he had not been aware of the signs, however, I find this incredulous since the negotiating committee reported to Blackmon everything that transpired during the negotiations.

2. The February 17 meeting

The parties met again for negotiations at 9 a.m. on February 17, the same place and same persons present. The meeting opened with the Union submitting a proposal to the Company pertaining to areas in which it felt employees should smoke. (Jt. Exh. 33.) This proposal was:

Union Proposal to Southwire Company 2–17–93

1. Tobacco usage on employees parking lot.
2. Designated area in plant in front of each department restroom. One additional area in the Power Cable Department in front of the Shield Line area.
3. Up stairs area employees be allowed to go out on the roof and smoke.
4. Ash trays with sand in each area.
5. Company get at least one cigarette machine in each break area.
6. Company take no tobacco sign from employees entrance into parking lot.

The parties caucused at 9:25 a.m. The Company representative contacted Jimmie Blackmon. They came back at 9:55 a.m. stating no to each of the six proposals the Union made. Asserting item 1 would create a litter problem and is totally opposed to the Company's objective and totally against corporate policy; as to item 2, the ceiling fans were installed to ensure airflow through and cool and was never intended to exhaust smoke, and again asserted that it was against corporate policy; item 3 created a litter problem and control of the employees leaving work stations. To items 4, 5, and 6, the Respondent said no, they were packaged together, they were trying to discourage the use of tobacco in the facility and contended that all other Southwire facilities were smoke free and it was a corporate policy. They also asserted the same with respect to the use of smokeless tobacco. Also at the meeting on February 17, the Union's second proposal on tobacco usage was:

Union Proposal to Southwire Company 2–17–93

1. Tobacco usage on employee parking lot.
2. Designated area in the plant in front of each department restroom.
3. Union will provide all ash trays and signs to address littering.
4. Company take the no tobacco sign from employees entrance to parking lot.

After caucusing Respondent returned with no to each proposal, essentially citing the reasons it had given earlier. The parties adjourned without agreement.

The parties did not meet again until March 16, during which time the Respondent charged the Union with engaging in dilatory tactics and deliberately protracting negotiations on the subject. The same parties were present as at the February meeting. The Union attempted to address the Company's rejection of the Union's proposals. The Union then presented the Company with a three-point proposal:

Union Proposal to Southwire Co.

March 16, 1993

1. Tobacco usage on employee parking lot.
2. Company take down no tobacco signs from employee entrance to parking lot.
3. Two designated areas for tobacco use. (1) vacant office at employee entrance into plant. (2) The vacant PVC room in back of the plant.

Again after a 15- to 20-minute caucus the Respondent returned and rejected on the same grounds and reasons all three of the Union's proposals, the Union then made one simple proposal that the employees be permitted to smoke outside the plant in the parking lot. Respondent asserted that was the worst of all proposals because of the problems it would create with employees slipping out the various entrances into the parking lot to smoke and again asserting the litter problem that it would create.

Respondent also stated that if it made an exception at the Starkville plant it would have to make exceptions at its other 17 facilities, none of which were organized. Throughout the negotiations Respondent asserted the corporate policy of no-tobacco usage facilities, but insisted it had the authority to negotiate exceptions at the Starkville facility. It pointed to the fact that policies concerning vacation plans, holidays, and et cetera varied at different of the employer's facilities. At the beginning of this session they discussed the proposed shift changes and allegations of solicitation in violation of the Company's no-solicitation rule. It should be remembered here that this is during the period of time commencing around March 8, that the decertification petition or cards were circulating through the plant.

Joe Davis then charged the Company was not bargaining in good faith over its tobacco usage rule and Respondent replied by stating something to the effect that unless the Union had other proposals to make there was nothing to negotiate about, at which point Respondent stated they were at impasse. The scheduled meeting for March 17 did not take place.

On March 29 (Jt. Exh. 45), the Respondent posted notices throughout the plant stating in bold type:

> **Effective Monday, March 29, 1993, the Southwire Starkville Plant will become a No-Tobacco Usage Facility. No-Tobacco usage will be permitted within the property lines of Southwire Company. The property lines include plant, office, company vehicles, and all parking lots as-well-as ground surrounding these areas.**

It was signed by Jimmie Blackmon and posted March 18, 2 days after the last negotiating session.

C. *Regarding Respondent's Bargaining Over Its No-Tobacco Usage Policy*

The employer's concern for the health of its employees and the adverse affect to health almost universally accepted to be caused by both first- and second-hand smoke and tobacco usage is commendable. The Board and courts have held that tobacco usage is a mandatory subject of bargaining under Sections 8(a)(5) and 8(d) of the Act.

Section 8(d) of the Act as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

The Respondent correctly argues that under Section 8(d) and numerous Board and court cases, including *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), it does not have to make any concessions and is entitled to stand firm on a position as long as he reasonably believes it is fair and proper and that he has sufficient bargaining strength to force the other party to agree. As Respondent also points out, its not the function of the judge or the Board to substitute their judgment for that of the Respondent with respect to the acceptability or unacceptability of a proposal from which it will not even make a token concession.

The General Counsel argues that Respondent has not bargained in good faith over the no-tobacco usage policy in that its primary ''bottom line'' response to every union proposal was against corporate policy and that it did not want to do anything differently at Starkville than it was doing at its other 17 nonunion facilities all of which were completely tobacco free. The General Counsel cites *Overnite Transportation Co.*, 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir. 1991). In enforcing the Board's Order in *Overnite* the court observed:

> Overnite's argument raises a valid point. If the company's behavior at the bargaining table were the only evidence of its state of mind, then it might have been difficult for the Board to support a finding that Overnite had no real desire to reach an agreement. See *Kankakee-Iroquois County Employers' Ass'n.*, 825 F.2d at 1092–94 (union's insistence that employer accept standardized contract not in bad faith where contract not unrealistically harsh and union's behavior suggested that it maintained open, accessible position); see also *Inland Tugs*, 918 F.2d 1299. At the very least, the lack of external factors would have presented the Board (and this court) with a more complicated task; when a determination must be made solely from proposals advanced and adhered to, the distinctions between lawful ''hard bargaining'' and unlawful ''surface bargaining'' are far from crystalline. See id. (citing *Eltec Corp.*, 297 NLRB 890 893–97 [127 LRRM 1021] (1987); *Kankakee-Iroquois County Employers' Ass'n.*, 825 F.2d at 1094–94; *Wright Motors*, 603 F.2d at 609–10.
>
> Overnite's argument ignores the facts, however, by focusing solely on its behavior at the bargaining table. There is more to this case than bargaining stance; Edwards openly declared the company's unlawful intentions prior to the commencement of collective bargaining. And when those statements are viewed alongside Overnite's behavior at the bargaining table, there arises a fair inference that Overnite was not honestly and in good faith attempting to preserve uniformity among its terminals. In other words, Overnite was not ''persuaded'' because it never had any intention to be persuaded; the company was making good on a promise never to cooperate with the Union. [938 F.2d at 822.]

I find this case to be analogous. The bargaining, three sessions, in an atmosphere of other unfair labor practices, including the Respondent's failure to fully comply with the Board's Order to ''cancel, withdraw, and rescind the no-tobacco usage program we put into effect'' the Respondent is required to restore the status quo ante, i.e., remove all signs it posted both outside and inside the plant advising employees of the implementation of the no-tobacco usage program and to replace any notices existing prior to the implementation which indicated where employees could use tobacco. In addition do nothing in derogation of the Board's Order. As noted above, I find Respondent's contention that these omissions were inadvertent to be completely ludicrous.

In this case in spite of the apparent compliance with the discreet physical requirements of bargaining, the evidence shows that the Respondent is in truth seeking to frustrate agreement, or to disrupt negotiations, or to oust the other party in determining wages and working conditions.

Accordingly, I find Respondent engaged in surface bargaining with the Union concerning the reimplementation of the rule and there was a total lack of good faith on Respondent's part all in violation of Section 8(a)(5) and (1) of the Act.

D. *Jimmy Jones—Refusal to Hire and Section 8(a)(1)*

Evidence in support of paragraph 10 of the complaint for the General Counsel was by applicants Jimmy Jones and Nathaniel Kimbrough, both of whom applied for employment about January 1993. Prior to reviewing and analyzing the testimony of Jones and Kimbrough. A review of the Employer's procedure when hiring new employees will aid in understanding the circumstances under which this alleged course of interrogation occurred.

> 1. The department manager prepares a requisition for the number of new employees he needs and presents it to the plant manager, Jimmy Blackmon. If it is approved.
>
> 2. The job openings are then posted in the plant for bidding by employees.
>
> 3. If no qualified employee bids on the job within an unspecified period of time.
>
> 4. Applicants are sought from the outside through references by present employees and the Mississippi Unemployment Service Commission.

Sometimes four or more applications are taken by the personnel department for each position. The hiring process then begins.

Personnel screens the applications for such desirable traits as a minimum high school education, stability of their work history, and other factors. The applications of the applicants who remain after personnel screening are sent to the department manager. He then tells personnel which, if any, of the applicants he wishes to personally interview. Personnel Manager Kathy Brown then contacts the applicant and arranges an interview with the department manager, in this case Jim French, who then interviews the applicant and if still interested takes him or her on a tour of the department explaining the operation. After this tour of the department, if the manager is still interested, the applicant is asked to take a drug test if the manager was not interested the applicant is escorted out. If the applicant passes the drug test he or she is considered a qualified applicant for the position. The department manager makes the decision to hire.

Jones testified about the middle of January he was out of a job and a friend, Franklin (Fred) Shumaker, a Southwire employee, told him Southwire was taking employment applications. Jones filed an employment application bearing the date of January 7, 1993, with Kathy Brown, personnel manager. (R. Exh. 1.) A few days later Brown called Jones and asked him to come in for an interview. When Jones arrived he was introduced to Jim French, power cable department manager. French, as was his practice according to his testimony, took Jones on a tour of his department which covers about half the area of the entire plant. During the course of the tour French showed Jones various equipment and told him about the shift structure, including the swing shift. Jones told French he could work any shift.

As they were touring the boundaries of the department French told Jones, that all of it was unionized, and he said he didn't know what they needed with a union, because they could get more without a union.'' (Tr. 117.) About this time Joe Shumaker, a shipper, and president of the Local Union, drove up on his Hyster and talked for a moment. He told French he should hire Jones because he knew him and he was a good guy. French said he was thinking about it. French then told Jones that he had ''worked in Arkansas where he was in a union for a lot of years, and he didn't find nothing that the Union could do but cost a lot of money.'' French then asked Jones how he felt about the Union. Jones told French, ''If he was working in a company and not on the clock, I wouldn't need a union, but if I was going to be on the clock, I would like to be in the Union.'' (Tr. 117.) Jones had been a supervisor at his previous employer which also had a union.

When they got back to the personnel office French asked Jones if he could wait a few minutes. He did. A lady (Kathy Brown) came out and asked Jones if he would take a drug test. He agreed and supplied a specimen. Brown told him they would get back to him. Jones was away for a couple of days and when he returned he called Brown who told him that they had not tried to call him. A few days later Jones asked Shumaker to ask French about his status. Shumaker reported back that French had told him they were not hiring at that time. A few days later Jones told Joe Shumaker about the union statements French had made and said he knew they were not supposed to do that as he had been a supervisor before.

Later, Fred Shumaker came by and told Jones not to say anything about the Union. Jones said it was too late he already had. Shumaker suggested that Jones call Nathaniel Kimbrough, who had worked with Jones at his previous employer, and tell him not to say anything about the Union. Kimbrough did as advised and was hired.

Kimbrough testified a few weeks later he was called for an interview which followed the same procedure as Jones. During the tour of the plant, French asked Kimbrough how he felt about the Union. Kimbrough replied that he had been out of work over a year and the Union was the last thing on his mind. Kimbrough testified further that French told him that French had been involved in a union in other work and it might have cost him his job. Kimbrough replied that the Union might have cost him his job at Bellwood. (His previous employer.) He was then given a drug test which he passed and was hired. He was still employed at Southwire at the time of the trial.

The essential difference in the narrative of French's interview with Jones and Kimbrough and their own is that French says that he told Jones there was a union there and he could join or not join. He testified that if employees or applicants asked about the Union he would tell them that he had been in the Union and the Union had never done anything for him. At the time Jones and Kimbrough applied, French said he had about six openings and he named seven people he interviewed including Jones and Kimbrough.

French was not an impressive witness and on cross-examination was unusually evasive and vague. He did testify, however, that if an applicant or employee brought up the Union he would tell them that he had been in one and it had never done anything for him. On the other hand Jones, on both direct and cross-examination was fairly concise and responsive to questions showing no indication of evasion or deceit. Another factor affecting French's credibility was the shifting reasons he gave for not hiring Jones, some of which were not in accord with Brown's reason.

French testified one reason for his refusal to hire Jones was that he had been a supervisor at his previous employer and that it was his experience that they usually did not work well in nonsupervisory positions. The fact that Jones was a supervisor at his previous employer was on the face of his application and was known to French before the interview. He still ordered the drug screening, however, which if passed, usually meant you were hired. Another intervening factor, however, came into play. At some point the same day after Jones' drug screening, Kathy Brown told French that Jones had made either an ''inappropriate'' remark or a remark that she ''did not appreciate.'' Incredibly, French testified that he made no inquiry of Brown as to precisely what the remark was or even the nature of it. At trial Brown testified that she did not remember what the remark was, but it was one she felt ''inappropriate'' or ''did not appreciate.''

French ultimately stated the reason for not hiring Jones was this remark. In March, however, Jones called Brown and was told that he did not meet the height and weight chart, which had gone into effect. (R. Exh. 8.) French knew nothing about a height weight chart and testified that his decision not to hire Jones had nothing to do with Jones' size. French seemed not to be aware of any such chart. It should be noted

that from their appearance at trial, both Jones and Kimbrough were over the weight chart (R. Exh. 8). Respondent asserted that the height-weight chart went into effect for applicants in February or March.

Findings

The above events occurred during the period of time Respondent was remedying previous unfair labor practices and yet another effort to decertify the Union was underway. Their is no doubt Respondent was well aware of, and approved, all efforts to rid itself of the Union. French's testimony that Jones' previous supervisory position was only one strike against him and it was the alleged ''inappropriate'' remark, made to Brown, the nature of which she could not remember and French did not inquire about, was the reason he did not hire Jones. On the other hand, Brown unequivocally testified that in March ''I personally told Jones that we did have a height and weight requirement that applicants must meet at that time, and I advised him that he did not fall within the appropriate ranges, so that we would not be able to continue the screening process for him.'' (Tr. 298.)

It is well settled that evidence showing that an employer gave shifting reasons for action against an alleged discriminatee illustrates that those reasons are pretextual. *Zurn Industries*, 255 NLRB 632, 634, 635 (1981). ''A pretextual reason of course supports an inference of an unlawful one.'' *Keller Mfg. Co.*, 237 NLRB 712 (1978), cf. *Seminole Fire Protection*, 306 NLRB 590, 592, 593 (1992). This principle of inference is particularly applicable where, as here, an employer is engaging in other extensive unfair labor practices.

I further find that Jim French violated Section 8(a)(1) by his interrogation of both Jones and Kimbrough as to how they felt about the Union and also his statement to Jones that the employees could get more without a union.

E. *William Scott*

Rex Henson, shipping manager, testified that about the middle of January cutting orders had gone up due to several factors and they were running behind in their cuts. (R. Exh. 4.) There are four cut lines or machines which were then running two shifts. There is a fifth cutting machine that is used occasionally. He wanted to start up the third shift temporarily to relieve the backlog and requisitioned four temporary employees. It was not until about the last of January that the plant manager approved the requisition. He stated that after approval he hired through the personnel department four temporary employees: John Haynes on January 25, Michael Howard and William Scott on January 26, and Greg Pearson on January 27. Jimmy Livingston was loaned to him temporarily by power cable to supervise the third shift.

Howard worked 1 day and did not come back. Henson made John Haynes a permanent employee and transferred him to the second shift, stating that he was hired a day before the others. Henson stated that he fired Greg Pearson on February 8 for excessive absenteeism. (R. Exh. 9.) Shortly thereafter Scott, being the only one of the four left who were hired to run the cutting room on the third shift, was transferred to the first shift as a cutter, scraping, and cleanup man.[7] On this record, it appears that the third shift ran the four cutting machines only one night since Howard did not report back the second night and Haynes was transferred to the second shift as a permanent employee. That left only Pearson and Scott who could operate only two cutting machines. On February 8, less than 2 weeks after he was hired Pearson was terminated for excessive absenteeism. Respondent says that it did not try to hire additional temporary employees to keep the third shift running because the number of cuts had rapidly fallen off. It appears that the cutting department ran the four cutting machines only one shift since Howard did not report the second day and Haynes was transferred to the second shift as a permanent employee. That left Pearson and Scott on the third shift for less than 2 weeks. Pearson was fired for excessive absenteeism on February 8 and the record does not disclose how many days he was absent between January 27, the day he was hired and February 8, the day of his discharge for excessive absenteeism. It would appear that third-shift operation could have done little to alleviate the backlog of cuts during this brief period.

Scott was hired by Kathy Brown, but was interviewed by Jimmy French. His supervisors were Mel Jones and Rex Henderson. Scott says that he was told by Mel Jones, the day supervisor, and Jimmy, the third-shift supervisor, that he was doing a good job.

Scott was told by Rex Henson at the end of the shift on March 29, that he was being laid off due to lack of work, but that he could work 1 more day, March 30.

The General Counsel contends that Scott's termination was prompted by his wearing a union-oriented T-shirt on March 29. The shirt, although not offered into evidence, was identified by Scott at the trial. The shirt was blue in color and had emblazoned on the front, ''A GREAT UNION, IUE, FOR A BETTER TOMORROW. BUY AMERICAN.'' Running through the words was something resembling a lightning bolt. On the back of the shirt was printed, ''RESPECT, THAT'S WHAT THE UNION MEANS TO ME.'' That Scott wore the shirt on the day in question is not in doubt even though Scott's testimony concerning how he came to be wearing the shirt and his knowledge that it ''was a union shirt'' (Tr. 154) is less than clear and unambiguous. Scott testified the shirt did not belong to him and the record does not reveal clearly how he came to be wearing it or to whom it belonged. When Scott started work on March 29 he had a sweatshirt on over the T-shirt. The sweatshirt got too warm and he removed it exposing the union T-shirt. A few minutes later some unidentified employee asked Scott what type of shirt it was and Scott asked what he meant. The employee told him he was wearing a union shirt. Scott turned the shirt inside out. Henson gave Scott a specific assignment and an employee named Reed asked him about the shirt.

Scott talked with Local Union President Joe Shumaker, who told him that it was not a good idea to wear the shirt. Scott put a windbreaker over the shirt and worked another couple of hours when Building Wire Department Manager Gerri Tate came to Scott at the water fountain and asked him which one of the guys in shipping was wearing a shirt saying something about ''respect the Union.'' Scott admitted that it was him and ''I told him I was not really aware of what the shirt was saying.'' Tate told Scott he had heard some talk in personnel about it. Scott asked if it was going to be a problem and Tate said he didn't know. Tate denies the foregoing dialogue with Scott. I credit Scott here. Hereafter, I am

[7] Henson testified that he had four full-time cutters on the first shift and Scott's only duties were scrapping and cleanup.

constrained to credit Vernita Robinson over Tate and I believe Tate denied everything he thought would be detrimental to the employer's case.

F. *Discussion*

In cases such as this, where both legitimate and invidious motives under the Act are offered to explain an employer's actions toward it employees, the Board relies on a two-step test to determine whether a causal relationship exists between the alleged discriminatory action and the employees' concerted activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. as modified 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The General Counsel first must make a prima facie showing sufficient to support an inference that the protected conduct was a motivating factor in the employer's decision to impose discipline on an employee. Once this is established, the burden shifts to the employer to demonstrate by a preponderance of the evidence that its conduct would have been the same even in the absence of the employee's protected activity. Id. at 1089; *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984).

The General Counsel argues that the timing of Scott's layoff or termination without any prior indication on the day that he wore the union shirt shows the true motive behind the discharge. Citing *Limpert Bros*., 276 NLRB 364 (1985), and *Aluminum Technical Extrusions, Inc*., 274 NLRB 1414 (1985).[8]

The Respondent argues in the first instance that the General Counsel has failed to make out a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the Employer's decision to take the action it did against Scott under the *Wright Line*, supra, rationale. It further argues in the alternative that even if the prima facie burden has been met the action against Scott would have been taken for legitimate business reasons. Respondent further points out that many employees were displaying prounion buttons, badges, and other items indicating their support for the Union and its knowledge that Scott wore a prounion T-shirt was of no great moment in view of the fact that it had not taken retaliatory action against others who showed support for the Union.

Henson testified that Scott was a marginal employee and cited an unspecified occasion when he had assigned Scott a task and he just sort of disappeared for about 1 hour. He did not indicate in his testimony that he made any comment to Scott about this. It is not denied that Scott had been told by his supervisor on both the third and first shift that he was doing a good job. The record does not indicate that Scott had even been verbally admonished about any element of his work and there were no written reprimands concerning his work.

There is no question that at this time Respondent was well aware of the fact that at least a third decertification effort was well underway in about as many years since Southwire had acquired this facility. The Union survived a decertification effort in December 1990, a little more than a year after Southwire's acquisition which gave the Union an irrebuttable 1-year period of insulation. It is evident that a second decertification effort was underway in 1992, which resulted in the settlement agreement in Case 26–CA–15098 on September 10, 1992, wherein Respondent agreed ''that any signature generated prior to the ending of the posting period will not be used to support any decertification petition or withdrawal of recognition.'' Another such decertification effort was underway in March 1993.

There is no doubt that Scott was more vulnerable than permanent employees since he was hired as a temporary. I find it more than a coincidence that on the day Scott wore the T-shirt indicating support for the Union that Respondent determined that it no longer needed his services although he was allowed to work 1 more day. His termination occurring in midweek, on a Tuesday, instead of the end of a pay period demonstrates Respondent's eagerness to rid itself of at least one union supporter. In view of Respondent's well-established union animus, I find that Respondent has not demonstrated by a preponderance of the evidence that its conduct would have been the same in the absence of Scott's protected activity. Accordingly, I find that Scott's termination violates Section 8(a)(3) and (1) of the Act.

Additional 8(a)(1) Allegations

The General Counsel relies on the testimony of Vernita Robinson to carry the burden of the allegations in paragraphs 12(a), (b), and (c). An employee committee monthly makes the selection of ''employee of the month.'' The record does not reveal what factors are considered in making this selection. Robinson works the second shift in the building wire department which is managed by Gerri Tate. Robinson was awarded the employee of the month award for April.

Robinson testified that a day or two before she received this award Gerri Tate came to her and told her that he had something that he wanted to tell her. He then asked if he could trust her and she replied, ''Yeah.'' Tate said, ''You know that little blue button you wear.'' Robinson asked what little blue button, ''My union button'' and Tate said, ''Yeah'' and asked what about it. Tate said, ''Well some one here thinks very highly of you and they'd appreciate it if you didn't wear the button.'' Robinson asked who and Tate replied he could not give her a name, but to take his advise and do not wear the button. Robinson said, ''Okay.''

The following day Tate called Robinson at home and told her to come in about 25 minutes early. She inquired why, if they were going to have a safety meeting and Tate said no, he just needed her to come in early. Tate says he had been called by the purchasing agent, ''Rosemary'' a member of management and told simply to call Robinson and tell her to come in early the next day. Rosemary did not say why and Tate did not inquire. When she arrived, the security guard held her outside along with some other employees until about 15 minutes before ''punch in'' time. Robinson met Tate in the corridor who talked about women never being on time. She asked where they were going and he told her to be patient. He then escorted her into the front lobby where she was presented with the ''Employee of the Month Plaque.'' The Respondent then caused to be published in the local newspaper a picture and brief writeup of Robinson's securing the award. (R. Exh. 2.) After the presentation of the plaque Tate accompanied Robinson out and told her, ''I told

[8] In its brief, Respondent asserted that Scott testified he wore the shirt the last day worked. He did answer yes to that question on cross-examination. His testimony as a whole, however, is clear that he wore the shirt on the day before when Henson told him he was laid off.

you that people here think very highly of you, and if you do the right thing better things could happen for you.'' Robinson replied, ''Okay.''

Tate denies any conversation with Robinson about the Union and any union insignia she may have displayed. He admits that on instruction from Rosemary he called Robinson and asked her to come in early, although he did not inquire the reason. After Robinson received the award Tate says he ''told her he thought she really deserved it, because of the work she had done as a female, being the only female to run the CU line.'' He continues that he told her ''that I realized that she's like other employee out there and don't think that we recognized things that they does [sic], but we really do, and I told her to keep it up.''

Prior to resolving the issues raised here with respect to Tate's alleged solicitation of Robinson to not wear her union button and the unspecified promise of benefits to stop doing so it is helpful to set forth other testimony by Robinson. According to Robinson, during this same period of time employee Maxine Washington who worked the first shift in Robinson's department worked overtime on the day in question. During their break, about 6 p.m., they were in the O.A. room Washington told her she had something she wanted to tell her. Washington said that she had asked her before and Robinson turned her down. Washington then told her that Gerri (Tate) had asked her to try to get Robinson to sign a card to get the Union out. She said that Gerri had told her they were going to hire a supervisor whereupon Robinson stopped her and told her she did not believe what Gerri was saying and in any event they would not hire her as a supervisor in view of her being a woman and having only a 12th grade education. Robinson told Washington Gerri was just using her to get Robinson to sign a decertification card.

Respondent called Washington, an ardent supporter of the decertification drive, who admitted that she had solicited Robinson to sign a card and to talking to her about becoming a supervisor. She states that she told Vernita that they need a lady supervisor, and Washington thought Vernita would make a good one. Washington, however, emphatically denied that she had been asked by Tate to solicit Robinson to come over to their side or suggest that Robinson could be made a supervisor if she did so. Washington says that was entirely her own idea.

It was well known in the plant that Washington was an ardent supporter of the drive to get the Union decertified and that Robinson was just as ardent in her support for the Union. Washington testified that she went to Plant Manager Jimmy Blackmon, Tate, and another supervisor, Willie Neeley, and asked them to stay out of it this time and let the employees handle it. She was evidently referring to previous occasions when management had been accused of improper conduct in a decertification effort. Washington also testified that no one from management ever admonished her not to solicit employees while either she or the employee was working. Although Respondent contended that employees on both sides were constantly reminded of the Employer's no-solicitation rule and solicited reports of any violations thereof.

I cannot credit Tate's testimony that he had never seen Robinson wearing a blue prounion bottom as he testified. Respondent's own witness, Washington, testified to her wearing such a button. I find as alleged that Tate told Robinson that a lot of people thought very highly of her and would appreciate it if she did not wear it, unequivocally implying some unspecified benefit would accrue to her if she supported the decertification effort. This is emphasized in his conversation with her following her award, ''I told you people here think very highly of you and if you do the right thing better things could happen for you.'' I note that Robinson was currently employed by Respondent as were most other General Counsel witnesses except Jones and Scott. The Board has long held that the testimony of a currently employed employee testifying adverse to their employer should be viewed favorable as opposed to the self-interest testimony of a supervisor. *Gold Standard Enterprises*, 234 NLRB 618 (1978), and *D & H Mfg. Co*., 239 NLRB 393, 396 (1978).

George Hart had worked for Respondent over 7 years as a repair operator on the first shift under the supervision of Jim French. Hart had supported the other decertification efforts undertaken at the plant. Hart testified that during the time of the petition, Jim French talked to him about the benefits and stuff they would receive if they did not have a Union, but that French never specifically asked him to sign a ''decert.''

Hart also testified that during the same period Plant Manager Jimmy Blackmon came to him on the floor and while not asking him to sign a card started talking ''about the people in the Union, hard heads, stuff like that, keeping us away from the benefits and stuff we should be getting.'' Blackmon continued, ''George, now I help you out,'' now its time to help him out. Hart told Blackmon he had already signed a decert card. Hart said that in the past Blackmon had let him come in on his days off ''to cut the grass'' and stuff to make up his time. Respondent argues in brief that Blackmon had made such comments to Hart on frequent occasions, sometimes to mow the grass and to participate on numerous committees. On this occasion, however, when Hart told Blackmon he had already signed a decert card, Blackmon expressed no other way in which Hart could help him out.

Accordingly, I find that Section 8(a)(1) was violated by French by promising Hart they would have better benefits if they did not have the Union. As noted above French testified that when asked he told employees that the Union had never done anything for him and told them about the benefits he had without a union. Similarly, in the context of Blackmon telling Hart the Union was keeping them away from benefits they should be getting Section 8(a)(1) was violated.

G. *Withdrawal of Recognition*

On Friday, May 28, about 4:30 p.m., employee Roy Bennett went to Jimmie Blackmon's office and handed him a manila envelope. Bennett had been one of the most active employees in the decertification effort. The two were alone and the record does not reveal that any words were exchanged between them. Bennett did not testify. The envelope contained 117 cards about 1 by 2 inches in size on which was printed, ''We the employees of Hi-Tech Southwire no longer desire to be represented by IBEW No. 1510'' and each bearing the name of an employee and allegedly signed

by that employee.[9] Blackmon testified that he took the cards to the personnel department and as best as I could verified the signatures on the cards with Personnel Manager Kathy Brown. According to Blackmon, they verified all the signatures from the personnel files and where the names were printed compared the printout name found in the personnel files. After this verification which took about 1 hour and 15 minutes he replaced them in the manila envelope and took them home with him for the weekend.

Monday was a holiday. On Tuesday Blackmon returned to the plant and placed the cards in a sealed manila envelope and locked them in a safe. Soon thereafter he gave them to Attorney Lambeth. On June 1, Lambeth wrote International Representative Davis a letter withdrawing recognition of the Union stating the Company was firmly convinced the Union no longer represented a majority of the employees in the unit. On June 2, Blackmon posted the following notice in the plant:[10]

NOTICE TO EMPLOYEES

June 2, 1993

> Our attorney has forwarded a letter to the Union and I am posting a copy for you to read. We are withdrawing recognition from Local 1510, I.B.E.W., based upon petitions signed by the substantial majority of Southwire employees indicating you do not wish continued representation by that union.
>
> WE WILL NOT recognize the union here at Southwire and WE WILL NOT deal further with Local 1510. If you have questions about this matter, please direct them to Jimmie Blackmon or Kathy Brown.
>
> /s/ Jimmie Blackmon
> Southwire Company

On June 4, Respondent announced that it was giving all hourly paid production and maintenance employees a 60-cent-per-hour wage increase effective June 6, by the posting of the following notice in the plant. (Jt. Exh. 51):

NOTICE TO ALL EMPLOYEES
JUNE 4, 1993

> I am pleased to announce that effective Sunday, June 6, 1993, a 60 cents per hour wage increase will be implemented for all hourly-paid production and maintenance employees. We are taking this action because we feel our plant has fallen somewhat behind in wages over the past year or so. We have not had the opportunity to do a comprehensive wage study, but we feel that the 60 cents increase, at least, is justified now. We will undertake to further evaluate our wage situation over the coming months, determine whether any additional increase will be given, and inform you of that decision in January 1994. During the same period we will also undertake to study all current benefit programs in effect for hourly production and maintenance employees, including the retirement plan and group health insurance, to determine whether changes might be made in those areas. We will announce any such changes also in January, 1994.
>
> /s/ Jimmie Blackmon
> Plant Manager

The Respondent admits the withdrawal of recognition and the granting of the wage increase. Another postwithdrawal violation, however, the failure to process grievances is denied in Respondent's answer. Henry McNeese, the chief steward, testified that after the Company withdrew recognition he went to Kathy Brown to process two pending grievances at the second step and she told him the Employer no longer recognized the Union, and refused the grievance. He had two more grievances going to the third step with Jimmie, but after Brown's refusal he did not attempt to process those further. He also tried to file a first-step grievance with Donnie Glenn who told him he had ''to wait until we get this settled first,'' and refused the grievance. The Respondent presented no evidence refuting this testimony.

The Respondent may not raise a question concerning representation in the atmosphere of unremedied unfair labor practices as set forth above. Even if it withdrew recognition of the Union based on a good-faith belief that the Union no longer enjoyed majority status it had a duty to continue with the processing of pending grievances.

Analysis and Conclusions

The basic principles are well settled. Absent unusual circumstances, a union is irrebuttably presumed to enjoy majority status during the first year following its certification. On expiration of the certification year, the presumption of majority status becomes rebuttable. *Parkview Furniture Mfg. Co*., 284 NLRB 947, 967 (1987). That rebuttable presumption also continues to apply after the expiration of a collective-bargaining agreement. *Guerdon Industries*, 218 NLRB 658, 659 (1975). An employer who wishes to withdraw recognition from a certified union after the first year, or after the expiration of a collective-bargaining agreement, may rebut the presumption of majority status in either of two ways: (1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority support, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain. Id. *Guerdon, Parkview*; in the instant case, Respondent contends that it has rebutted the presumption under both options set out above.

Although a majority of the unit did not support the Union on the relevant date, the law is equally well settled that an employer may not avoid its duty to bargain by relying on any loss of majority status attributable to his own unfair labor practices. *Pittsburgh & New England Trucking*, 249 NLRB 833, 836 (1980).

> Thus, it is clear that prior unremedied unfair labor practices remove as a lawful basis for an employer's withdrawal of recognition the existence of a decertification petition or any other evidence of loss of union support which, in other circumstances, might be considered as providing objective considerations demonstrating a free

[9] R. Exh. 5 by stipulation the Respondent was permitted to place photo copies of the front and back of each card into evidence in lieu of the originals.

[10] The letter from Lambeth to Davis and the notice to employees posted by Blackmon are in evidence as Jt. Exh. 50.

> and voluntary choice on the part of employees to withdraw their support of the labor organization.

Id. *Pittsburgh & New England*. The unfair labor practices, however, must be of a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. Id. *Guerdon*, supra, stated differently, the unfair labor practices must have caused the employee disaffection here or at least had a ''meaningful impact'' in bringing about that disaffection. *Deblin Mfg. Corp.*, 208 NLRB 392 (1974). In short, there must be a causal relationship between the unlawful conduct and the petition of August–September 1982. *Olson Bodies, Inc*., 206 NLRB 779 (1973).

The General Counsel contends, in effect, that the causal relationship is demonstrated as a matter of law by virtue of the continued impact of the unremedied unfair labor practices in light of the background of flagrant and serious unfair labor practices.

Under *Olson*, supra, several factors are named as criteria for determining whether a causal relationship has been demonstrated. They include: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

With respect to the first factor there had been no significant time lapse of Respondent's unfair labor practices for at least 2 years prior to the withdrawal of recognition based on the cards submitted on May 28. What is more persuasive that there was nexus between the unfair labor practices and that those unfair labor practices had a ''meaningful impact'' in bringing about employee disaffection is the timing of Respondent's remedying of same. Moreover, some of the unfair labor practices found here occurred simultaneously with the decertification effort the results of which Respondent bases its withdrawal of recognition. Factors two and three are the reasons for addressing the settlement agreement and the notice to employees posted pursuant thereto from September 16 to November 17, 1992. The entire notice dealt with employers alleged participation or interference in another decertification effort. It advises employees that it will not disparately enforce its no-solicitation/no-distribution rule by prohibiting union solicitation and distribution while permitting such nonunion activity; promising improved benefits to reject the Union; telling its employees it would be futile to retain the Union as their collective-bargaining representative; soliciting its employees to sign the decertification petition; or solicit them to act as employer agents in the decertification effort.

On the heels of this notice followed the notice posted pursuant to the Board Order at 309 NLRB 10 (1992), on January 7, 1993, which remained posted until March 7, 1993, just a day before the first of the decertification cards introduced here. This notice advised the employees, inter alia, that the employer would not unilaterally implement or enforce certain rules; that it would not discharge or otherwise discriminate against employees for their union activity; that it would not refuse to bargain in good faith with the Union; that it would rescind its unlawfully implemented no-tobacco usage policy, and that it would offer reinstatement to, and make whole an employee it had discriminatorily discharged.

The time elapsing between the positing of these notices and the commencement of the decertification drive here was simply not sufficient to dissipate the impact of the employer's unfair labor practices. Particularly where during the instant effort the evidence established that the employer continued to interfere with its employees' freedom of choice by interrogating them; and soliciting them not to wear prounion insignia and promising unspecified benefits to support the decertification effort. In the instant case, this conduct was directed to only a few employees, however, the Board has held that it is unnecessary, in negating a claim of an uncoerced majority, to show mathematically that less than a majority freely signed authorization cards. A pattern of company assistance can be sufficient to invalidate all cards. See *NLRB v. Jan Power, Inc*., 421 F.2d 1058, 1061–1062 (9th Cir. 1970).

In view of the foregoing establishing Respondent's own misconduct it could not in good faith withdraw recognition of the Union.

CONCLUSIONS OF LAW

1. Hi-Tech Cable Corporation, a Subsidiary of Southwire Company is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local Union No. 1510 is a labor organization within the meaning of Section 2(5) of the Act.

3. The appropriate unit is:

> All hourly rated production and maintenance employees at the Employer's cable and wire plant in Starkville, Mississippi, excluding office and clerical employees, technical and engineering employees, professional employees, management and supervisory employees as defined in the Act, and guards.

4. At all times material the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By engaging in the following conduct, the Company violated Section 8(a)(1) of the Act.

(a) Interrogating its employees and applicants for employment concerning their union activities and sympathies.

(b) Soliciting its employees not to wear prounion insignia.

(c) Soliciting its employees to support the decertification effort.

(d) Promising its employees unspecified benefits to stop wearing a union button.

6. By engaging in the following conduct, the Company has violated Section 8(a)(3) and (1) of the Act.

(a) By failing and refusing to employ applicant Jimmy Jones on or about January 26, 1993, because of his union and concerted protected activities.

(b) By discharging, failing, and refusing to reinstate its employee William Scott because of his union and protected concerted activities.

7. By engaging in the following conduct, the Company has violated Section 8(a)(5) and (1) of the Act.

(a) Since on or about February 16, 1993, failing and refusing to bargain with the Union in good faith regarding its no-tobacco usage policy.

(b) By unilaterally implementing a no-tobacco usage policy at its Starkville, Mississippi facility.

(c) Since on or about June 4, 1993, failing and refusing to process employee grievances.

(d) By, on about June 2, 1993, withdrawing its recognition of the Union as the exclusive collective-bargaining representative of all employees in an appropriate unit.

(e) By, on or about June 6, 1993, unilaterally and without negotiation with the Union granting its employees a 60-cent-per-hour wage increase.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has engaged in violations of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company unlawfully discharged its employee William Scott and unlawfully refused to hire for employment applicant Jimmy Jones, I shall recommend that it be ordered to offer immediate and full reinstatement to Scott to his former position of employment and if that position is no longer available to a substantially equivalent one without prejudice to his seniority or any other rights and privileges previously enjoyed. I further recommend that Respondent be ordered to offer Jimmy Jones the job for which he applied without loss of any benefits he would have accrued absent Respondent's refusal to hire him. I recommend that Respondent be ordered to make William Scott and Jimmy Jones whole for any loss of earnings and other benefits they may have suffered by reason of Respondent's discrimination against them. Backpay is to be computed in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[11]

Recognize the Union as the exclusive collective-bargaining representative for all the employees in the appropriate unit and on request bargain with the Union as the exclusive representative of the employees and embody any understanding reached in a signed agreement.

[Recommended Order omitted from publication.]

[11] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1997 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).